GRANTED

No. 00-1

In The

Supreme Court of the United States

DAVID R. MCKUNE, Warden and CHARLES SIMMONS, Secretary, Kansas Department of Corrections,

Petitioners,

v.

ROBERT G. LILE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, upon an inmate's invocation of his Fifth Amendment rights, a decision to transfer that inmate to maximum security and impose corresponding sanctions constitutes compulsion under the Fifth Amendment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 4

A. The Tenth Circuit followed this Court's precedent in determining that the SATP compels Mr. Lile to incriminate himself 5

B. The Tenth Circuit's decision does not conflict with other courts' decisions to the extent that this Court should review it 7

C. The *Turner* "reasonableness" standard of review applies in the prison context; that the Tenth Circuit employed the four-factor test in determining whether Petitioners met that standard is not sufficient to merit review 9

D. Although sex offender treatment is important, the framework suggested by the lower courts permits Petitioners to meet all of its stated goals for SATP 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Bankes v. Simmons, 265 Kan. 341, 963 P.2d 412 (1998) 8, 9

Baxter v. Palmigiano, 425 U.S. 308 (1975) 6, 7

Chambers v. Bachicha, 39 F.3d 1191, 1994 WL 596702 (10th Cir. Oct. 28, 1994) 8, 9

Gardner v. Broderick, 392 U.S. 273 (1968) 6

Garrity v. New Jersey, 385 U.S. 493 (1967) 5

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) 8

Guilkey v. Holden, 865 F.2d 258, 1988 WL 134526 (6th Cir. Dec. 16, 1988) 7, 8

Lefkowitz v. Cunningham, 431 U.S. 801 (1977) 5

Lefkowitz v. Turley, 414 U.S. 70 (1973) 5

Minnesota v. Murphy, 465 U.S. 420 (1984) 7

O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) 10

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) 6

Searcy v. Simmons, 97 F. Supp. 2d 1055 (D. Kan. 2000) 6

Spevack v. Klein, 385 U.S. 511 (1967) 5, 6

Tedder v. Francke, 931 F.2d 897, 1991 WL 65497 (9th Cir. Apr. 24, 1991) 7, 8

Turner v. Safley, 482 U.S. 78 (1987) 9, 10

TABLE OF AUTHORITIES – Continued

Page

Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968) 5

Washington v. Harper, 494 U.S. 210 (1990).....9, 10

STATEMENT OF THE CASE[1]

a. Nature of the Case

Mr. Lile was convicted in 1983 of kidnaping, rape, and aggravated sodomy. He pled not guilty and still maintains that his conduct with the victim was consensual. He is incarcerated at the Lansing (Kansas) Correctional Facility ("LCF"), where he is serving a life sentence. (Pet. App. at 33-34a).

When Mr. Lile entered LCF, prison officials did not require him to take part in sex offender therapy. However, in 1994, prison officials notified Mr. Lile that they were requiring him to take part in the Department of Corrections' Sexual Abuse Treatment Program ("SATP"). As part of their efforts, officials added this program to Mr. Lile's inmate program agreement ("IPA"). (Pet. App. at 34a).

Participants in SATP are required to sign an "Admission of Guilt"[2] form and to provide a detailed sexual history, including any uncharged sexual offenses. Petitioners then utilize polygraph testing to determine the veracity of the participant's statements, and they also employ penile plethysmograph testing for treatment purposes. These testing results are then discussed in group therapy sessions. (Pet. App. at 34-35a).

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[1] Mr. Lile is content to proceed with Petitioners' statement as to the opinions below, jurisdiction, and statutes involved in this appeal. *See* Sup. Ct. R. 24.2.

[2] After Mr. Lile filed suit in the United States District Court for the District of Kansas, Petitioners changed the title of this form to "Admission of Responsibility." (Pet. App. at 34a).

In 1995, the Kansas Department of Corrections revised its internal management policies and procedures ("IMPP"). (Pet. App. at 34a). IMPP compels inmates to participate in required prison programming. In the instance of SATP, failure to complete the program results in a mandatory transfer in custody to maximum security and a concomitant implementation of sanctions. These sanctions include, but are not limited to: (1) limiting visitation to clergy, counsel, and immediate family; (2) limiting the amount of personal property an inmate may keep in his cell; and (3) limiting an inmate to $0.60 per day in prison pay.[3] (Pet. App. at 35a). Moreover, stay in maximum security custody exposes an inmate to a greater threat of personal harm. (Pet. App. at 18a).

b. District Court

Mr. Lile agrees with Petitioners' recitation of the District Court proceedings, but would add one point. In granting Mr. Lile summary judgment on his Fifth Amendment claim, the District Court held that, consistent with the Fifth Amendment, Petitioners still could continue to run SATP in its present form as long as they gave Mr. Lile immunity for any incriminating statement which he disclosed. (Pet. App. at 45a).

[3] These same sanctions are imposed upon an inmate convicted by the prison of theft, arson, or drug possession. (Pet. App. at 24a).

c. The Tenth Circuit

Mr. Lile agrees in part with Petitioners' interpretation of the Tenth Circuit's opinion but would offer additional clarification.

In discussing the Tenth Circuit's determination that the penalties involved in this case implicated the Fifth Amendment, Petitioners state: "In reaching that conclusion, the [Tenth Circuit] emphasized that a critical factor is that refusal to participate in the SATP, 'standing alone,' results in the loss of privileges." (Pet. at 5, citing to Pet. App. at 19a).

However, the Tenth Circuit did not state that the *refusal to participate in the program* resulted in the loss of privileges. Rather, the court noted that: "Plaintiff's *refusal to submit to the interrogation* – to disclose the required information about his sexual history – standing alone, would certainly result in the transfer to [maximum security] and the corresponding loss and restrictions of many privileges." (Pet. App. at 19a) (emphasis supplied).

Similarly, Petitioners suggest that the Tenth Circuit determined that SATP was not truly "voluntary" because sanctions automatically followed Mr. Lile's "refusal to participate in the SATP program." (Pet. at 5). Again, Petitioners misstate the Tenth Circuit's ruling. The Tenth Circuit concluded that participation in SATP was not voluntary because Petitioners "would impose sanctions solely because Plaintiff wishes to remain silent and invoke his Fifth Amendment right against self-incrimination. . . . " (Pet. App. at 20a). This distinction may seem minor; however, it is important to note that the Tenth Circuit held that it was Mr. Lile's *invocation of his Fifth*

Amendment rights – not an overall refusal to participate in SATP – that triggered Petitioner's sanctions.

REASONS WHY THE PETITION SHOULD BE DENIED

Respondent Robert G. Lile ("Lile") respectfully requests this Court deny the Petition for a Writ of Certiorari seeking review of the United States Court of Appeals for the Tenth Circuit's affirmation of the United States District Court for the District of Kansas' grant of summary judgment for Mr. Lile.

The issue of sexual abuse and treatment is one that demands attention from the State of Kansas. Mr. Lile is willing to take part in SATP. However, in order to do so, he must admit he committed the crime for which he is incarcerated. If he does make this admission, he faces potential charges for perjury. He must also catalog all uncharged sexual offenses. If he does so, prison officials are required under state law to report these crimes. He must submit to polygraph examinations to gauge the veracity of his admissions. All results and admissions are then discussed in group sessions.

Mr. Lile's invocation of his Fifth Amendment privilege against self-incrimination will result in Petitioners' transfer of Mr. Lile to maximum security, stripping him of his ability to work certain jobs and have visitation with anyone outside of counsel, clergy, and immediate family, while at the same time exposing him to a more dangerous environment. These same sanctions are imposed upon inmates when an inmate is convicted by the prison of

theft, arson, drug use or possession, and assault or when a prosecutor files felony charges against an inmate.

This Court should not grant Petitioners' request for review. The Tenth Circuit's decision was correct. Moreover, there is nothing unique or complicated about this case. Mr. Lile faces an appreciable risk of incrimination if forced to admit guilt and catalog his uncharged crimes. Further, Petitioners punish him for invoking his constitutional rights.

Neither the District Court nor the Tenth Circuit's decision was so sweeping as to eliminate SATP and Petitioners' interest in rehabilitating sex offenders. Petitioners can continue to operate SATP – and even penalize those who refuse to take part – as long as they give immunity for those incriminating statements made during treatment.

A. The Tenth Circuit followed this Court's precedent in determining that the SATP compels Mr. Lile to incriminate himself.

Mr. Lile agrees that his move to maximum custody and the corresponding sanctions he faces do not involve liberty interests. However, as stated by the Tenth Circuit and not disputed by Petitioners, this Court has repeatedly found Fifth Amendment violations without engaging specifically in a liberty interest review. *See, e.g., Lefkowitz v. Cunningham*, 431 U.S. 801, 808-09 (1977); *Spevack v. Klein*, 385 U.S. 511, 516 (1967); *Lefkowitz v. Turley*, 414 U.S. 70, 82 (1973); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280, 283-85 (1968); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967);

Gardner v. Broderick, 392 U.S. 273, 278-79 (1968). As the Court stated in *Spevack*: " 'Penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, the imposition of *any sanction* which makes the assertion of the Fifth Amendment privilege 'costly.' " *Spevack*, 385 U.S. at 515 (emphasis added).

The Tenth Circuit followed this Court's rulings in determining that SATP violated Mr. Lile's Fifth Amendment rights. As such, this Court should not grant Petitioners' request for review.

Petitioners also suggest that, because this Court did not find Fifth Amendment violations in other cases, the Tenth Circuit was wrong in finding one here. Again, the Tenth Circuit properly distinguished this Court's rulings in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), and *Baxter v. Palmigiano*, 425 U.S. 308 (1975). In *Woodard*, after noting that drawing adverse inferences for silence in a civil proceeding did not violate the Fifth Amendment, the Court stated that "[i]t is difficult to see how a voluntary interview could 'compel' respondent to speak." *Woodard*, 523 U.S. at 286. The Tenth Circuit properly distinguished *Woodard*, agreeing with this Court that the clemency interview in *Woodard* was voluntary and that "no separate and distinct substantial or potent consequences were imposed" as they are in Mr. Lile's situation. (Pet. App. at 21a). The dramatic language of *Searcy v. Simmons*, 97 F. Supp. 2d 1055, 1059 (D. Kan. 2000) (Pet. at 9), notwithstanding, Mr. Woodard's clemency did not hinge on whether he participated in clemency review. (Pet. App. at 21a). In the present case, the sanctions Petitioners would impose come as a direct result of Mr. Lile's invocation of his Fifth Amendment rights.

Similarly, with respect to *Baxter v. Palmigiano*, 425 U.S. 308 (1975), the Tenth Circuit correctly noted that, in Mr. Lile's situation, the penalties he faced were not as speculative as the possible repercussions in *Baxter*. Again, in Mr. Lile's case, punishment *automatically* results when he invokes his Fifth Amendment rights. (Pet. App. at 19a).

Moreover, despite Petitioners' repeated suggestions (Pet. at 10-11), the Tenth Circuit did not suggest it was Mr. Lile's *refusal* to enter SATP that triggered his sanctions. Rather, it was his *invocation* of his Fifth Amendment rights: "[W]e hold that there is a 'reasonable basis for concluding that [Defendants] attempted to attach an impermissible penalty to the exercise of the privilege against self-incrimination.' " (Pet. App. at 25a-26a (quoting *Minnesota v. Murphy*, 465 U.S. 420, 437 (1984)). The District Court made a similar finding: "[O]peration of IMPP 11-101 clearly presents such a costly burden to plaintiff's exercise of his rights under the Fifth Amendment." (Pet. App. at 44a). Any attempt to suggest that Petitioners punish Mr. Lile simply because he seeks to avoid SATP are incorrect and certainly should not require review by this Court.

B. The Tenth Circuit's decision does not conflict with other courts' decisions to the extent that this Court should review it.

Petitioners identify four cases which they believe conflict with the Tenth Circuit's decision. Two of those cases, *Tedder v. Francke*, 931 F.2d 897, 1991 WL 65497 (9th Cir. Apr. 24, 1991) (unreported), and *Guilkey v. Holden*, 865

F.2d 258, 1988 WL 134526 (6th Cir. Dec. 16, 1988) (unreported), do state that an inmate has no liberty interest in discretionary parole. This is not in dispute in the present case, nor could it be given the previous rulings by this Court. *See, e.g., Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). However, these cases are not in conflict with the Tenth Circuit's decision here.

In *Tedder*, the Ninth Circuit Court of Appeals rejected plaintiff's Fifth Amendment claim, not under a liberty interest analysis, but because "[a]ny admissions that he would make would be privileged" under state law. *Tedder*, 1991 WL 65497, at **2. "An inmate patient's disclosures to a treating therapist are unavailable to the state or federal government to use in a court proceeding. If he chose to undergo the treatment, [plaintiff] would not be providing the state with incriminating evidence." *Id.*

Further, in *Guilkey*, the Sixth Circuit Court of Appeals did state that Kentucky's parole statute and its sex offender treatment program did not create a liberty interest protected by due process. The court did not, however, state that this lack of liberty interest doomed plaintiff's Fifth Amendment claim. On the contrary, plaintiff's Fifth Amendment claim extinguished because "plaintiff's admission would be a privileged communication not subject to disclosure in any civil or criminal proceeding." *Id.* at **1.

Similarly, the decisions in *Bankes v. Simmons*, 265 Kan. 341, 963 P.2d 412 (1998), and *Chambers v. Bachicha*, 39 F.3d 1191, 1994 WL 596702 (10th Cir. Oct. 28, 1994) (unreported), also do not demand review of Mr. Lile's case.

While *Bankes* found no compulsion under the Fifth Amendment after a liberty interest analysis, the Tenth Circuit's decision in this case is the better one. The Tenth Circuit found no evidence that this Court had ever engaged in a liberty interest analysis when examining a Fifth Amendment claim and determined that this Court's approach was better suited for Mr. Lile's claim. (Pet. App. at 14a).

As for *Chambers*, the Tenth Circuit here decided to revisit a terse discussion from this unpublished decision that brushed upon the Fifth Amendment/liberty interest issue and decided that, because this Court had never utilized a liberty interest analysis before for Fifth Amendment claims, it need not do the same. Such a correction does not create the conflict in the circuit courts on which Petitioners rely for this Court's review.

C. The *Turner* "reasonableness" standard of review applies in the prison context; that the Tenth Circuit employed the four-factor test in determining whether Petitioners met that standard is not sufficient to merit review.

The Tenth Circuit did not err when it employed the "reasonableness" standard of review set forth in *Turner v. Safley*, 482 U.S. 78 (1987), in determining that SATP violated Mr. Lile's Fifth Amendment rights. This approach is consistent with this Court's ruling in *Turner* that this standard should be used to determine whether a prison regulation is invalid when it interferes with an inmate's constitutional rights, even if those rights are fundamental. *See id.* at 89; *see also Washington v. Harper*, 494 U.S. 210,

224 (1990) ("We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights.").

However, it appears that Petitioners seek review to determine if the Tenth Circuit's use of the four-factor analysis set forth in *Turner* is appropriate for Fifth Amendment claims. Mr. Lile agrees that this Court has never stated that the four-factor test was a *required* analysis under *Turner*, but it has suggested that what *Turner* did, in part, was "identify several factors relevant to this reasonableness determination." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987).

Working from the premise that a court can turn to the *Turner* "reasonableness" standard when prison policies affect constitutional rights, the Tenth Circuit used the four-factor analysis to determine whether SATP met that "reasonableness" standard. The court only had to determine that SATP passed the *Turner* "reasonableness" standard of review. That it did more and turned to the four-factor test suggested by this Court to assist that determination does not warrant this Court's attention.[4]

[4] Since this Court decided *Turner* in 1987, it has turned to the *Turner* factors in two instances where prison regulations impacted the constitutional rights of inmates. *See O'Lone*, 482 U.S. at 350-51; *Washington*, 494 U.S. at 224-226.

D. Although sex offender treatment is important, the framework suggested by the lower courts permits Petitioners to meet all of its stated goals for SATP.

Petitioners feel handcuffed to provide the curative benefits of SATP unless they can rely on their system of sanctions to motivate inmates. They suggest that SATP cannot work unless participants can "overcom[e] denial" and be open about their sex offenses. Their treatment programs have been successful, but need to rely upon a system of "strong incentives" in order to get inmates to participate. (Pet. at 14-15).

However, there is little reason for the Court to intervene to provide Petitioners a workable solution on policy grounds. The *only* manner in which the lower courts' rulings alter Petitioners' ideal structure of SATP is to give immunity for incriminating statements made. As Petitioners are motivated by an interest in getting sex offenders to participate with candor and honesty (while being able to penalize them for refusing treatment), the District Court and Tenth Circuit – following precedent from this Court – already have provided such framework to Petitioners. By giving immunity for any incriminating statements, Petitioners will secure the frank discussion required for the treatment of sex offenders. Further, providing immunity would enable Petitioners to leave in place their system of sanctions for those who refuse. Thus, Petitioners could move closer to their goals of rehabilitation while maintaining leverage to punish those who choose not to participate.

For example, Mr. Lile agrees that participation in sex offender treatment is an important issue for prison officials, and he is willing to take part in such treatment if given immunity for any incriminating statements. Under this framework, Petitioners would secure open discussion from Mr. Lile on his sexual history, enabling them to provide sex offender treatment to him. But, if Mr. Lile decided he did not want to participate in SATP, Petitioners would still be equipped with the ability to sanction Mr. Lile by sending him to maximum custody. There is little reason for the Court to grant Petitioners' writ on this point; their goals of rehabilitation can be met under the present rulings of the lower courts.

CONCLUSION

For the foregoing reasons, Mr. Lile respectfully requests that this Court deny the petition for a writ of *certiorari*.

Respectfully submitted,

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